

1993

Southern Utah Federal Credit Union v. Olympus Bank, Joseph E. Stevens : Brief of Appellee

Utah Court of Appeals

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Case No. 930329-CA

Appeal from Summary Judgment
of the Fifth Judicial District Court
for Washington County, Judge J. Philip Eves

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SOUTHERN UTAH FEDERAL
CREDIT UNION,

Plaintiff/Appellant,

VS.

OLYMPUS BANK and
and JOSEPH E. STEVENS,

Defendants/Appellees.

Case No. 930329-CA

BRIEF OF APPELLEE JOSEPH E. STEVENS

Appeal from Summary Judgment
of the Fifth Judicial District Court
for Washington County, Judge J. Philip Eves

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IN THE UTAH COURT OF APPEALS

SOUTHERN UTAH FEDERAL)	
CREDIT UNION,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	Case No. 930329-CA
OLYMPUS BANK and)	
and JOSEPH E. STEVENS,)	
)	
Defendants/Appellees.)	

BRIEF OF APPELLEE JOSEPH E. STEVENS

JURISDICTION OF THE COURT

This appeal was taken to the Utah Supreme Court on the authority of Utah Code Ann. §78-2-2(3)(j). The Supreme Court assigned the case to this Court, and this Court has jurisdiction, pursuant to Utah Code Ann. §78-2a-3(2)(k) and Rule 42 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

This action is a challenge to the validity of a trustee's foreclosure sale by which Appellant Credit Union's interest in certain real property was extinguished. This Court must determine whether the District Court erred in its summary judgment that the foreclosure sale was valid as a matter of law because the purpose of the statutory notice requirement was met, the Notice of Trustee's Sale adequately described the place of sale, the interests of the debtors were not sacrificed in the sale and any injury to the Credit Union resulted from its own error.

The standard of review is that of "correctness" as to the District Court's conclusions of law and its determination that there were no genuine issues of material fact. Neiderhauser Builders & Development Corp. v. Campbell, 824 P.2d 1193, 1196 (Utah App. 1992). In review of this summary judgment, this Court should apply the same Rule 56 standard as that applied by the District Court, that there is no genuine issue of material fact and Appellees are entitled to judgment as a matter of law. Barber v. Farmers Insurance Exchange, 751 P.2d 248, 251 (Utah App. 1988); Rule 56(c), Utah Rules of Civil Procedure.

DETERMINATIVE STATUTE AND RULE

The Credit Union bases its appeal on a restrictive interpretation of Utah Code Ann. §57-1-25(2) regarding trustee's sales:

The sale shall be held at the time and place designated in the notice of sale which shall be between the hours of 9 a.m. and 5 p.m. and at the courthouse of the county in which the property to be sold, or some part thereof, is situated.

Appellee Stevens submits that this statute is relevant, but not necessarily determinative of the issues before this Court. Rule 56(c), Utah Rules of Civil Procedure, also contains the following applicable standard:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A. Nature of the case. Appellant is a credit union which held an interest in certain real property pursuant to a second trust deed. Appellee Olympus Bank was the beneficiary of the first trust deed interest in the same real property. The debtor and property owner, who is not a party to this action, defaulted his obligations to the Bank, and the Bank commenced foreclosure of the first trust deed under the provisions of Utah Code Ann. §57-1-23 et seq., by giving Notice of Default followed by Notice of Trustee's Sale. The Notice (see Addendum) specified the place of sale as "the Washington County Courthouse, at or about 197 East Tabernacle, St. George, Washington County, Utah." The building at the specified address formerly housed the courts of Washington County, but now houses other county officers, including the County Recorder. Washington County courts are now housed in the Washington County Hall of Justice, three blocks away from the address given in the Notice of Trustee's Sale.

On the day of sale, October 20, 1992, the Bank's representative and five other persons went to the place of sale specified in the Notice. The Credit Union's representative and its attorney went to the Hall of Justice and found no sale there. The Bank's representative sold the real property at public auction at the address specified in the notice, and Appellee Joseph E. Stevens was the highest bidder.

Having lost its subordinate interest in the real property without being present to bid at the sale, the Credit Union challenged the validity of the notice and the place of sale.

B. Course of proceedings. The Credit Union filed its Complaint on November 6, 1992, and obtained a temporary restraining order, without hearing or prior notice, which prohibited the Bank from delivering to Mr. Stevens the trustee's deed to the real property. Counsel for the Bank and Mr. Stevens later stipulated to continuance of the temporary restraining order pending the District Court's disposition of the case. By informal stipulation of counsel, Answers to the Complaint were not filed.

On November 25, 1992, the Bank filed its Motion for Summary Judgment and supporting documents. On December 8, 1992, the Credit Union filed its own Motion for Summary Judgment and objection to the Bank's motion, with supporting documents. The Credit Union stipulated to the Bank's statement of facts, however, and added two affidavits which both supported the stipulated facts and added other unstipulated statements. On December 14, 1992, Mr. Stevens filed his Memorandum of Points and Authorities, joining the Bank's motion and opposing the Credit Union's motion. Mr. Stevens also stipulated to the Bank's statement of facts, with the exception of the last sentence of the Bank's paragraph 19. Mr. Stevens further submitted his own affidavit as to additional facts.

Oral argument on both motions was heard by the District Court on December 17, 1992.

C. Disposition by the District Court. The District Court granted the Bank's Motion for Summary Judgment and denied the Credit Union's motion on the basis of the facts which were stipulated by all parties. The District Court concluded that there were no genuine issues of material fact. The District Court further concluded, on the principal basis of a prior decision of

this Court, that the trustee's sale was valid because the Notice of Trustee's Sale met the purposes of the statutory notice requirement, it adequately described the location of the sale, there was no evidence that the debtor's interests were sacrificed in the sale and any injury to the Credit Union resulted from its own error. Consequently, the District Court terminated the temporary restraining order and dismissed the Credit Union's Complaint.

STATEMENT OF FACTS

A. Stipulated facts. As noted above, the Bank filed the first Motion for Summary Judgment in this action. Its supporting Memorandum contains twenty-six paragraphs of "undisputed facts." (Record on Appeal pp. 17-22.) The Credit Union agreed to the Bank's undisputed facts without qualification in its own Memorandum, and simply added reference to two affidavits submitted by the Credit Union. (Record p. 38; for affidavits see Record pp. 11-13 and 32-37.) Mr. Stevens also stipulated and agreed to the Bank's statement of undisputed facts in his Memorandum, with one exception. (Record p. 57.) Mr. Stevens further added his own affidavit. (Record pp. 65-67.)

The District Court's Summary Judgment recites that the Court reviewed all motions, memoranda, affidavits and pleadings, and based its decision on the undisputed facts stated in the Summary Judgment (see Addendum), which are as follows (Record pp. 17-22, 38, 57, 76-79):

1. This action deals with real property (hereinafter "the Property") located in St. George, Washington County, State of Utah, and more particularly described as follows:

All of Lot Nine (9), Green Valley Subdivision, a subdivision according to the official plat thereof, on file in the office of the Recorder of Washington County, State of Utah.

2. Olympus Bank held a first position deed of trust lien in the Property in the approximate sum of \$35,000.

3. SUFCU [the Credit Union] held a second position deed of trust lien in the Property, in the approximate sum of \$25,000.

4. On September 29, 1992, Olympus Bank mailed its Notice of Trustee's Sale to all interested parties having any interest of record in the Property.

5. [The Credit Union] received four separate envelopes, each containing an identical copy of the Notice of Trustee's Sale.

6. Two envelopes were addressed to "Southern Utah Federal Credit Union" and two were addressed to "St. George Federal Credit Union nka Southern Utah Federal Credit Union."

7. Two of the four notices were sent via regular mail and two were sent via certified mail, return receipt requested.

8. The two certified mailings were received by a "Pat Stratton" who signed both post office return receipts on October 5, 1992.

9. Neither of the two notices which were sent via regular mail were ever returned to Olympus Bank as undeliverable.

10. In addition to the mailing of Notices of Trustee's Sale to all interested parties, Olympus Bank caused the notice to be posted on the subject property and in three public places in Washington County, Utah, on September 27, 1992.

11. Furthermore, Olympus Bank caused the notice to be

published in The Daily Spectrum on Tuesday, September 22, 1992; Tuesday, September 29, 1992; and on Tuesday, October 6, 1992.

12. The Notice of Trustee's Sale recited that the sale would be held at the Washington County Courthouse, at or about 197 East Tabernacle in St. George, Utah.

13. The building located at 197 East Tabernacle in St. George is the "Washington County Administration Building." This building does not house any of the courts.

14. In times past, the Washington County Administration Building housed the Fifth Judicial District Court and was called the "Washington County Courthouse."

15. Although the building located at 197 East Tabernacle no longer houses any courts, it is still referred to as the "Courthouse" or the "Old Courthouse" by many residents of St. George, Utah.

16. Some foreclosure sales are still conducted at 197 East Tabernacle and title insurance companies insure such sales.

17. The Fifth Judicial District Court is now located at 220 North 200 East in St. George, Utah, in a building named the "Hall of Justice."

18. Representatives of [the Credit Union] had contacted Olympus Bank in the days prior to the trustee's sale to discuss the fact that [the Credit Union] would appear at and bid at the trustee's sale for the purpose of protecting its second lien position in the Property.

19. Mr. Stevens and [the Credit Union] had discussed the trustee's sale over the phone approximately two weeks prior to the sale.

20. On October 20, 1992, Bob Elliott, as the representative of Olympus Bank, Mr. Stevens and several other individuals went to 197 East Tabernacle, St. George, Utah, to witness or participate in the 10:00 a.m. foreclosure sale.

21. The representative of [the Credit Union] and its counsel went to the Hall of Justice at 220 North 200 East, St. George, Utah, to participate in the foreclosure sale.

22. Bob Elliott conducted the foreclosure sale at 197 East Tabernacle and received bids from Olympus Bank, Mr. Stevens and one other individual.

23. The highest bid was received from Mr. Stevens and Bob Elliott sold the property to him.

24. Shortly after the foreclosure sale was conducted, [the Credit Union] contacted Bob Elliott to inquire as to why the sale had not been conducted.

25. Mr. Elliott informed [the Credit Union] that the sale had been conducted at 197 East Tabernacle.

The District Court also included certain undisputed facts regarding the procedural history of the action. The District Court then concluded "that there are no material issues of fact in dispute" and rendered Summary Judgment on the basis of the foregoing undisputed facts. (Record pp. 79-81; see Addendum.)

B. Immaterial allegations. It is implicit in the Summary Judgment that the District Court considered certain other facts asserted in affidavits filed by the Credit Union to be insufficient to raise a genuine issue of material fact. The Credit Union's Brief on this appeal contains references to allegations regarding

the value of the subject property which were not stipulated as fact and which were not presented to the District Court in any manner sufficient to meet the requirements of Rule 56 of the Utah Rules of Civil Procedure. The supporting statement of the Credit Union's representative about the assessed value of the property (Record p. 35) was clearly hearsay and not competent or admissible evidence under Rule 56. See, e.g., Walker v. Rocky Mountain Recreation Corporation, 19 Utah 2d 274, 508 P.2d 538 (1973) (hearsay testimony that would not be admissible at trial is not admissible to support or oppose summary judgment). Similarly, the statements of the Credit Union's representative about her own beliefs as to property value and her subjective bidding intentions (Record p. 35) are simply unsubstantiated conclusions and are insufficient under Rule 56; an affidavit containing only unsubstantiated conclusions and failing to state evidentiary facts is insufficient to create an issue of fact. Id.

The Summary Judgment was based upon the form of the Notice of Trustee's Sale being in substantial compliance with the statutory requirements. (Record pp. 79-80; see Addendum.) The form of the Notice was not related in any way to the Credit Union's unsubstantiated opinions of the property value or its alleged bidding intentions, so those allegations failed to raise a genuine issue of material fact. Summary judgment is not precluded "simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted." Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980).

SUMMARY OF ARGUMENT

The Credit Union makes the definitional argument that the statutory term, "the courthouse", has only one possible definition; and the hyper-technical argument that a sale held elsewhere cannot possibly be valid. While the Credit Union argues that the place of sale was not "the courthouse", the District Court did not determine whether it was or was not "the courthouse." The Credit Union's argument simply ignores the prior decisions of this Court and the Utah Supreme Court regarding foreclosure procedures and sales. Even if the Notice or place of sale were in error, the Courts do not invalidate sales on the basis of such immaterial errors when the purposes of notice have been met. The purpose of the Notice of Trustee's Sale is to inform persons who have an interest in the property of the coming sale, so they may act to protect their interests.

The District Court correctly determined that the Bank's specification and use of the place of sale identified in the Bank's Notice, if erroneous, was an immaterial error because the objectives of the statutory notice requirement were met. All persons with an interest in the property were notified of the sale and the specific address at which the sale was to be held. The Credit Union admits it received actual notice and discussed the forthcoming sale with both the Bank and Mr. Stevens. It simply failed to act to protect itself, either before or at the sale. Furthermore, the notice requirements are intended to protect debtors, not creditors such as the Credit Union. The District Court correctly concluded that the interests of the debtor were not

sacrificed in the sale, and the debtor has not complained of the sale. The District Court correctly concluded that any injury to the Credit Union resulted from its own error, and the Credit Union cannot use its own error as a loophole or escape mechanism.

The Credit Union's argument about "inadequacy" of the sale price is raised too late, is not properly supported on the Record and is not supported by Utah case law. The Credit Union can identify no fraud or unfair dealing associated with the trustee's sale, and the courts recognize that forced sales rarely produce prices near actual value. The District Court correctly declined to invalidate this trustee's sale.

ARGUMENT

POINT I: "THE COURTHOUSE" IS AN AMBIGUOUS TERM, AND ITS DEFINITION IS NOT THE TRUE ISSUE ON THIS APPEAL

A. The Credit Union's definitional argument. The Credit Union cites Utah Code Ann. §57-1-25(2), which provides that trustee's sales should be held "at the courthouse of the county in which the property to be sold or some part thereof is situated." The Credit Union argues that the term "the courthouse" is so patently unambiguous and clear that it was error for the District Court to sustain the foreclosure sale. On the meager authority of Black's Law Dictionary, the Credit Union argues that "the courthouse", which the Utah Legislature left undefined, can have only one possible meaning.

Taken to its logical conclusion, the Credit Union's argument would be that the designation of the place of sale in a Notice of Trustee's Sale need not even include the specific address of the

place of sale; it would be sufficient to recite merely "the courthouse of Washington County" as the place of sale. The Credit Union would further conclude that any specific address given in the Notice may be ignored entirely, as the Credit Union did with the Bank's Notice, because "the courthouse" is such a clear and complete identification.

The Credit Union's argument ignores the fact that there may be more than one "courthouse" in a county. The Credit Union stipulated that the building at which the Bank's foreclosure sale was noticed and conducted is still commonly called the "courthouse" or "old courthouse," so that the term "courthouse" is used in Washington County to refer to both the newer Washington County Hall of Justice and the former Washington County Courthouse at the specific address given in the Notice of which the Credit Union complains. (Record pp. 20-21, 38.)

Furthermore, the Fifth District Court was well-aware of the fact that it sits in an Iron County "courthouse" in both Parowan and Cedar City, and that the District, Juvenile and Circuit Courts of Salt Lake County occupy several different locations. Faced with the reality that the term "courthouse" may in fact refer to more than one building or location, simple good sense prevented the District Court from concluding that this dispute should have been resolved by the blind adoption of the Credit Union's definitional argument.

The true issue on this appeal is not the definition of the term "courthouse", it is whether noticing and conducting a foreclosure sale at a former courthouse, where the specific address

was given in the Notice of Trustee's Sale but was ignored by the Credit Union, is a material error. Mr. Stevens submits that the District Court correctly rejected the Credit Union's definitional argument in its Summary Judgment. The District Court correctly declined to determine whether the Bank's place of sale was a "courthouse".

B. The "strict compliance requirement". The Credit Union argues that the term "shall" in the foreclosure statute makes the statutory provisions mandatory to such an extent that only perfect compliance with all requirements will allow a foreclosure sale to be upheld. The Credit Union's argument simply ignores the decisions of this Court and the Utah Supreme Court about the sufficiency of meeting the objectives of statutory foreclosure requirements and the immateriality of certain errors in notice or procedures.

The objective of the notice requirements is to protect the rights of those with an interest in the property to be sold. The sufficiency of the notice or the validity of a subsequent sale will not be affected by immaterial errors and mistakes if those objectives are met.

Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217, 220 (Utah App. 1990).

The authorities regarding immaterial errors are discussed at length below. The Court should note that, in every decision cited in Point II below, and every decision cited by the Credit Union on this issue (Credit Union's Brief, pp. 13-16), a failure to comply strictly with a mandatory or "shall" requirement was held to be immaterial and insufficient to justify overturning a foreclosure sale.

**POINT II: THE FORECLOSURE SALE WAS
VALID BECAUSE THE PURPOSE AND
OBJECTIVE OF NOTICE WERE MET**

The Credit Union has challenged the District Court's conclusion that the Bank's foreclosure sale was valid, and contends that the purpose of notice was not met. The District Court's Summary Judgment (Record p. 80; see Addendum) recites its conclusion as follows:

Notwithstanding the fact that Olympus Bank's foreclosure sale was conducted at a location that does not house a court, the foreclosure sale is valid because the Notice of Trustee's Sale adequately described the location of the sale to all parties with an interest in the Property. Consequently, the rights of all parties with an interest in the Property were protected and the purpose of the notice requirement was met.

Mr. Stevens submits that the District Court correctly interpreted the facts and the prior decisions of this Court and the Utah Supreme Court.

A. The purpose of notice is to provide information, and the Credit Union had actual notice. The Credit Union has relied in part upon Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158 (Utah 1987), for its proposition that nonjudicial foreclosure sales can proceed only in compliance with "'strict' notice requirements," but that case fails to support the Credit Union's conclusion. The plaintiff in Concepts, Inc. was a debtor who sought to have a foreclosure sale overturned on the basis of a typographical error in the notice of sale. The year in which the sale was to be held was incorrectly stated in the notice. The trial court held that the sale was void, but the Supreme Court

reversed that decision, holding that the notice of sale substantially complied with the statutory requirements. The Court explained:

The purpose of strict notice requirements in a nonjudicial sale of property secured by trust deed is to inform persons with an interest in the property of the pending sale of that property, so that they may act to protect those interests.

743 P.2d at 1159. The Court concluded that the debtor was not misled by the notice and held that the notice was sufficient to provide the necessary information.

In the case before this Court, as in Concepts, Inc., the District Court had to determine whether the Notice of Trustee's Sale gave persons with an interest in the property sufficient information, so that they could act to protect themselves.

The stipulated facts establish that the Credit Union was fully informed of the pending sale. Notice was given by recording, mailing, posting and publication. (Record pp. 19, 38.) There can be no question whatsoever that the Credit Union had actual notice of the foreclosure sale well in advance of the sale; the Credit Union's agents discussed the coming sale with both the Bank and Mr. Stevens prior to the sale, and the Credit Union retained legal counsel and attempted to attend the sale. (Record pp. 18, 21, 38.) The sale was attended by six people, half of whom made bids for the property (Record pp. 20, 38), but the Credit Union simply failed to pay enough attention to the Notice of Trustee's Sale and went to the wrong location. The results of that failure should not be imposed upon either the Bank or Mr. Stevens.

There was no reason whatsoever that the Credit Union could not have attended the sale and protected its interests. The sale was held precisely as specified in the Notice of Trustee's Sale. Any problem could have been avoided if the Credit Union had questioned the place of sale or objected to it at any time prior to or at the sale. Instead, the Credit Union ignored the information provided by the Notice, and failed to act to protect itself.

The principles of Concepts, Inc. did not require the Bank to insure the Credit Union against its own inaction. The Bank was only required to provide sufficient information through notice to allow the Credit Union to act to protect itself, and the District Court correctly concluded that the notice was adequate.

B. The objective of notice is the protection of debtors, not creditors. In the Concepts, Inc. case, the trustee's sale was challenged by the lender, who was the purchaser at the trustee's sale. The lender had failed to commence a deficiency action within three months after the trustee's sale, so it attempted to use an error in its own notice of sale to set aside the sale and conduct a new foreclosure. The Supreme Court explained:

Defendant's argument that the flaw in the notice by publication invalidated the sale to it perverts and uses as a sword a statute that was meant to shield the property rights of a trustor. A sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing.

743 P.2d at 1160 (emphasis by the Court). The Court cited several authorities in its explanation that "[t]he reason for strict compliance with the statute 'is to protect the property of the debtor'...". Id. (citation omitted; emphasis by the Court). The

Court concluded that the debtor's interests had been protected by the foreclosure statutes, and held that the lender could not use its own typographical error to set aside a foreclosure sale where only the lender's interests were at stake. Id. at 1161.

The District Court in the present case similarly concluded that the sale was valid because "[t]here is no evidence that the interests of the debtors were sacrificed in the sale." (Summary Judgment, Record p. 80; see Addendum.) It is significant that the debtor who was foreclosed by the Bank has not complained about the sale. The significance of this fact has also been recognized by this Court: "[T]he trustor, to whom the protections of the trust deed statute inure, has not challenged the validity of the initial sale." Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217, 221 (Utah App. 1990). Citing Concepts, Inc., this Court has also explained that "[t]he detailed procedural requirements for a trustee's sale of real property under Utah Code Ann. §§57-1-23 to - 34 (1986) are intended to protect the debtor/trustor." Jones v. Johnson, 761 P.2d 37, 41 n.2 (Utah App. 1988).

The District Court in the present case correctly applied this principle to the fact that there is no evidence on the Record that the Bank's foreclosure sale sacrificed the interests of the debtor. In fact, the Credit Union asserted that the debtor had filed bankruptcy (Affidavit of Blake, Record p. 12) and, at the Court's request, the Court was given a certified copy of the debtor's Discharge in Bankruptcy. (Record pp. 73-74.) Consequently, the Credit Union, but not the debtor, would be affected by the trustee's sale. The only complaint is by the Credit Union, a creditor which received actual notice of the sale and attempted to

attend the sale, failing to attend only because of its failure to pay attention to the Notice. The protections of the notice requirement of the trust deed statute are not intended to apply here.

C. Immaterial errors do not invalidate foreclosure sales.

This Court discussed the purpose of foreclosure notice requirements in Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217 (Utah App. 1990). In connection with its explanation of the principle of debtor protection, this Court explained:

The "detailed procedural requirements for a trustee's sale of real property are intended to protect the debtor/trustor." . . . The objective of the notice requirements is to protect the rights of those with an interest in the property to be sold. The sufficiency of the notice or the validity of a subsequent sale will not be affected by immaterial errors and mistakes if those objectives are met.

791 P.2d at 220 (citations omitted; emphasis added). This Court further explained what would constitute a material error in the foreclosure process:

A party may have an apparently valid trustee's sale set aside for irregularity, want of notice, or fraud if there is evidence sufficient to overcome the presumption of its validity [T]he only kinds of defects in the notice of a foreclosure sale that will justify a renunciation of the sale are "those that would have the effect of chilling the bidding and causing an inadequacy of price." . . . A sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some fraud or unfair dealing Absent evidence tending to show the above factors, a trustee's sale will not be set aside.

791 P.2d at 221 (citing Concepts, Inc.). Accordingly, the Bank's foreclosure sale is presumed to be valid, and the Credit Union would have been entitled to have the sale set aside only by showing

that an irregularity, a want of notice or a fraud had caused the interests of the debtor to be sacrificed through a "chilling of the bidding."

There certainly was not a want of notice in the Bank's foreclosure. The stipulated facts demonstrate that the Credit Union received actual notice of the sale, and could have attended the sale as easily as did Mr. Stevens and the five other persons who apparently had no trouble understanding the Notice and who did attend the sale. (Record pp. 20,38.) The only "irregularity" alleged by the Credit Union is the place of sale, but the place of sale was specifically identified in the Notice and was recognized by at least the six persons who attended the sale. Furthermore, the place of sale was not just a random location, but a site at which trustee's sales were still being routinely conducted. (Record pp. 22, 38.) Finally, the Credit Union has not alleged that the Bank's foreclosure was affected by any form of fraud.

Having no evidence of fraud or unfair dealing, the Credit Union also cannot show that the bidding was "chilled." The debtor has not complained about the sale or the sale price, and Credit Union cannot demonstrate that the interests of the debtor were sacrificed, but only that the Credit Union's own interests were left unprotected by its failure to attend the sale. Consequently, the only potential bidder whose bid was arguably chilled was the Credit Union, since bids were received from three persons who attended the sale. (Record pp. 20,38.) Bidding is not "chilled" when an interested party simply ignores the notice of sale. The facts do not provide the Credit Union with any basis for overcoming the presumption that the sale was valid.

It is significant that the Credit Union does not contend that anyone but itself was misled by the Notice so that any other bids were chilled. In fact, at least six people were not misled, because they attended the sale, and half of them bid on the property. (Record pp. 20, 38.) "Defendant's statement that the [defect in the notice] had the potential to mislead prospective bidders is insufficient to conclude that it in fact did." Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1160 (Utah 1987).

The District Court correctly concluded that the foreclosure sale was valid because the Notice adequately described the location of sale and any error therein was immaterial. Consequently, the purpose of the notice requirement was met.

**POINT III: MERE INADEQUACY OF PRICE,
EVEN IF ESTABLISHED, WILL NOT JUSTIFY
OVERTURNING A TRUSTEE'S SALE**

A. This issue cannot be first raised on appeal. Having been unable to establish any material error in the Notice of Trustee's Sale or as to the place of sale, the Credit Union has now argued that the price paid by Mr. Stevens at the trustee's sale was "substantially inadequate" and that such inadequacy would justify overturning the sale. This argument is not mentioned in the District Court's Summary Judgment, because it was not raised by anything in the Credit Union's motion or memorandum, except one statement in the Credit Union's memorandum that "the bidding was 'Chilled' [sic] and caused an inadequate price." (Record p. 41.) The issue and argument in the Credit Union's Brief on appeal was not adequately raised at the District Court and cannot be first

raised on appeal. Smith v. Iverson, 848 P.2d 677 (Utah 1993) ("the trial court should have the first opportunity to address issues later raised on appeal"; issues not framed in complaint or in summary judgment motion or memorandum are not considered on appeal).

B. This issue is not properly raised by evidentiary facts. The facts asserted by the Credit Union in support of this argument are entirely hearsay and unsubstantiated opinions, which are not sufficient to support or oppose a summary judgment motion. This deficiency in the Credit Union's argument has been discussed at pp. 8-9 above.

C. The Credit Union cannot show fraud or unfair dealing. Even if this Court allows the Credit Union to raise the issue of adequacy of price, the authorities cited by the Credit Union entirely fail to support its conclusion. The principle upon which the Credit Union relies, as it applies in Utah, is succinctly stated in an early case which is not cited by the Credit Union, First National Bank of Salt Lake City v. Haymond, 89 Utah 151, 57 P.2d 1401 (1936). In that case the debtor appealed from a deficiency judgment in a mortgage foreclosure. The mortgaged property had a value exceeding \$8,000, but had been sold at sheriff's sale for only \$100, leaving a deficiency of more than \$2,000. The Court stated, without citing authorities, the Utah version of the principle argued by the Credit Union in the present case:

It is quite generally held that substantial inadequacy of price, coupled with fraud, mistake, or other unfair dealing is sufficient to justify a court of equity upon timely motion to set aside the sale and order a resale.

89 Utah at 159. While it recognized this principle, the Court found no fraud, mistake or other unfair dealing as to the sale which would justify overturning it, and affirmed the deficiency judgment.

The Credit Union relies heavily upon Pender v. Dowse, 1 Utah 2d 283, 265 P.2d 644 (1954) in which a debtor challenged an execution sale which was not related to mortgage financing. A property valued at \$8,000 had been sold to satisfy a judgment for costs in the amount of \$22.80. The Court noted that no notice of the sale had been given to the debtor or his attorney, the creditor had refused to levy on available personal property, and the creditor and his attorney had acted unfairly and fraudulently in the conduct of the execution sale. The Court affirmed the trial court's judgment setting aside the execution sale, on the same principle as recited in the Haymond case:

It is well settled that equity will intervene and set aside an execution sale ... where it appears the consideration was grossly inadequate and the sale was attended by unfairness and fraud.

265 P.2d at 647. Having found a "grossly inadequate" sale price and unfairness and fraud, the sale was correctly set aside.

The Pender and Haymond cases illustrate that the Utah courts have adopted a form of the principle asserted by the Credit Union, without adopting the expansive language cited by the Credit Union from the courts of other states. Pender and Haymond further illustrate that the fact that a foreclosure sale price is significantly less than the value of the property sold is entirely insufficient to overturn the sale. Actual fraud or unfair dealing

must also be shown before a court will ignore the presumption that the sale was valid.

Several of the cases cited by the Credit Union fail to support its argument because the courts ultimately declined to overturn a sale in spite of significantly low sales prices. McHugh v. Church, 583 P.2d 210 (Alaska 1978) (property potentially worth \$300,000 sold for \$98,000); Bullington v. Mize, 25 Utah 2d 173, 478 P.2d 500 (1970) (property worth \$97,500 sold for \$25,000); Steward v. Good, 51 Wash. App. 509, 754 P.2d 150 (1988) (property worth \$64,000 sold for \$4,870). In each instance, as in Haymond, there was not evidence of fraud or unfair dealing, but a mere inadequacy of price. The courts acknowledge that "a forced sale of land by auction rarely brings a price which approximates its actual value," McHugh v. Church, 583 P.2d at 214, and will not overturn a sale without evidence of fraud or unfair dealing.

The other cases cited by the Credit Union, in which sales were set aside, also illustrate the necessity of finding fraud or unfair dealing. Schroeder v. Young, 161 U.S. 334 (1896) (fraud in conduct of successive sales); Graffam v. Burgess, 117 U.S. 180 (1886) (creditor intentionally misled debtor); Arnold v. Gebhardt, 604 P.2d 1192 (Colo. App. 1979) (trustee misrepresented length of redemption period); McCartney v. Frost, 386 A.2d 784 (Md. 1978) (statute required sheriff to obtain reasonable price or postpone sale); Miebach v. Colasurdo, 102 Wash. 2d 170, 685 P.2d 1074 (1984) (creditor made no effort to satisfy claim from personal property, as required by statute).

The Credit Union's authorities establish that a mere disparity between the price paid at a foreclosure sale and the value of the property sold will not affect the validity of the sale, without significant evidence that the disparity resulted from fraud or unfair dealing. The Credit Union, by the use of hearsay and unsubstantiated opinions, compares Mr. Stevens's successful bid of \$35,010 to a supposed value of \$60,000 to \$96,000, and concludes that the bid was inadequate. The Credit Union cannot point to any evidence, however, of fraud or unfair dealing as required by the courts. The Credit Union's argument is not a substitute for facts, and even the foreign jurisdictions which apply the principle more liberally would not accept the Credit Union's argument.

**POINT IV: THE CREDIT UNION CANNOT
USE ITS OWN MISTAKE AS AN EXCUSE
TO OVERTURN THE FORECLOSURE SALE**

The concept that a party cannot use its own error as the basis for overturning a foreclosure sale was a factor in this Court's decision to uphold a foreclosure sale in Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217 (Utah App. 1990). In that case, the foreclosing lender had conducted two foreclosure sales, and its bid at the second sale was less than one-half the amount of its bid at the first sale, thus leaving a larger deficiency. The lender sought to avoid the first sale, and the smaller deficiency, on the basis that its own notice of sale was given only two months after the filing of an amended notice of default. This Court held that the lender had failed to prove that the interests of the debtor had been infringed by the notice, and affirmed the trial court's decision upholding the sale. This Court

noted that "Occidental failed to establish any compelling justification which would allow it to utilize its own error to invalidate the . . . trustee's sale." 791 P.2d at 221.

This Court applied this same principle again only seven months later in Thomas v. Johnson, 801 P.2d 186 (Utah App. 1990). In that case, the debtor had appealed from a deficiency judgment entered against him after a trust deed foreclosure. It was undisputed that the debtor had received proper notice of sale, but he chose not to attend the sale or submit a bid. Consequently, the only bidder at the sale was the beneficiary under the trust deed. The debtor did not challenge the sufficiency of the notice, but contended that the beneficiary's bid of the "fair market value", without making it a specific dollar amount, was improper. This Court upheld the deficiency judgment, however:

We can find no evidence that Johnson's [the debtor's] interests were sacrificed by the trustee's action at the November 1987 sale Furthermore, Johnson could have attended the trustee's sale and made a fixed-dollar bid to protect his own interests, but he chose not to Any injury to Johnson's interests resulted from his own inaction and imprudent judgment, not from any noncompliance with the statutes governing nonjudicial foreclosure sales. We therefore conclude that the trial court properly declined to set aside the trustee's sale in this case.

801 P.2d at 189 (emphasis added). Even though the objection was made by the debtor, whose interests the statutory provisions are intended to protect, the debtor could not rely upon his own inaction and imprudent judgment to set aside a sale.

Mr. Stevens submits that this principle applies to the facts before this Court. Any injury to the Credit Union was entirely self-inflicted. The Credit Union cannot establish that any

interested party, except itself, had any trouble attending the foreclosure sale. The statutes are not intended to protect the Credit Union from itself.

Mr. Stevens submits that the Credit Union was not actually misled by the Notice of Trustee's Sale. The facts show only that the Credit Union's representatives simply went to the wrong location. The Credit Union made no objection to the Notice or the location of the sale until after it had failed to attend the sale. If this had resulted from the Credit Union's failure to read the Notice, that could provide no ground for avoiding the sale. If sales could be avoided simply by ignoring notices actually received, the foreclosure process would become completely unreliable.

The Credit Union alleges that it did read the Notice, however. If so, it apparently acted on the basis of assumption by going to the wrong location for the sale. It would be completely unreasonable, however, for the Credit Union to read the Bank's Notice and then assume (a) that "Washington County Courthouse" really meant "Hall of Justice", and (b) that "197 East Tabernacle" meant nothing at all. If the Credit Union was misled, it was misled by its own false assumptions and not by anything contained in the Notice of Trustee's Sale.

CONCLUSION

The Credit Union cannot meet the burden of showing adequate grounds for overturning this foreclosure sale. The objectives of the notice requirements were met by the Notice of Trustee's Sale. The Credit Union either failed to read the Notice, or it read the

Notice and ignored it. This cannot justify overturning this sale. The District Court's Summary Judgment was no error, and it should be affirmed.

DATED this 25th day of August, 1993.

JONES, WALDO, HOLBROOK & McDONOUGH

By: G. Rand Beacham
G. Rand Beacham
Attorneys for Joseph E. Stevens

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of August, 1993, I caused to be mailed two (2) true and correct copies of the foregoing Brief of Appellee Joseph E. Stevens to each of the following:

LaMar J Winward
Attorney at Law
150 North 200 East #204
St. George, Utah 84770

Marlon L. Bates
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

G. Rand Beacham

ADDENDUM

NOTICE OF TRUSTEE'S SALE

The following described real property will be sold at public auction to the highest bidder, purchase price payable in lawful money of the United States of America at the time of sale, at the South Steps of the Washington County Courthouse, at or about 197 East Tabernacle, St. George, Washington County, Utah, on Tuesday, October 20, 1992, at the hour of 10:00 a.m. of that day for the purpose of foreclosing a trust deed executed by Herbert L. Norcross and Linda J. Norcross, as Trustors, in favor of Prudential Federal Savings and Loan Association as beneficiary. The aforesaid deed of trust was recorded on September 14, 1976 in book 202, page 118, entry no. 177752 in the official records of Washington County, state of Utah as assumed by Glenn Hafen and Linda Hafen on August 9, 1978. The real property covered by the aforementioned deed of trust and this notice of trustee's sale is located at 930 South 1420 West, St. George, Washington County, state of Utah, and is more particularly described as follows:

All of Lot Nine (9), GREEN VALLEY SUBDIVISION, a Subdivision according to the Official Plat thereof, on file in the Office of the Recorder of Washington County, State of Utah.

The beneficiary directed the substitute trustee to foreclose the aforementioned deed of trust for the purpose of paying certain obligations secured thereby, including the unpaid principal balance of that certain promissory note, dated September 8, 1976 all accrued interest to date, any late charges authorized

by the note, and all costs, expenses, and fees associated with the preparation of this notice and the foreclosure sale of the trust property. The trustee's sale of the aforescribed real property will be made without warranty as to title, possession, or encumbrances.

DATED this 18th day of September, 1992.

Thomas W. Winther
Thomas W. Winther

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

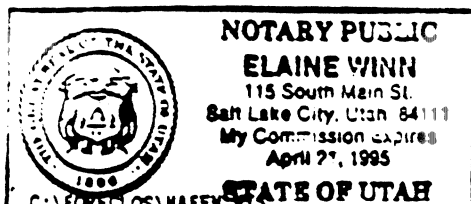
On this 13th day of September, 1992, personally appeared before me Thomas W. Winther, who being by me duly sworn, did say that he is the Loan Servicing Officer of Olympus Bank, which is chartered under the laws of the United States of America and authorized to do business in the state of Utah, and that the foregoing instrument was signed on behalf of Olympus Bank by authority of its by-laws or a resolution of its Board of Directors, and said Thomas W. Winther acknowledges to me that said association executed the same.

My Commission Expires:

4-31-95

Elaine Winn
NOTARY PUBLIC
Residing at:

Salt Lake City, Utah



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COPY
BY JBH

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

SOUTHERN UTAH FEDERAL CREDIT : SUMMARY JUDGMENT
UNION,

Plaintiff,

vs.

:

OLYMPUS BANK, and JOSEPH E.
STEVENS,

Civil No. 920501095

Defendants. : Judge J. Philip Eves

This matter came before the Court pursuant to the Motions for Summary Judgment filed by plaintiff, Southern Utah Federal Credit Union (hereinafter "SUFCU") and defendant, Olympus Bank (hereinafter "Olympus Bank"). In support of these motions, SUFCU, Olympus Bank, and defendant Joseph E. Stevens (hereinafter "Stevens") filed memoranda of points and authorities which set forth certain undisputed facts and presented written arguments in support of said motions. Furthermore, a hearing was held on December 17, 1992 at the hour of 9:30 a.m. wherein SUFCU, Olympus Bank, and Stevens were all represented by their respective counsel of record and oral arguments were heard in support of said motions.

The Court has reviewed the motions, the memoranda and affidavits in support thereof, and all pleadings on file herein and has fully considered the oral arguments made by the respective parties hereto and now, after being fully advised in the premises, bases its summary judgment on the following undisputed facts:

This action deals with real property (hereinafter "the Property") located in St. George, Washington County, State of Utah, and more particularly described as follows:

All of Lot nine (9), Green Valley Subdivision, a subdivision according to the official plat thereof, on file in the office of the recorder of Washington County, State of Utah.

Olympus Bank, held a first position deed of trust lien in the Property in the approximate sum of \$35,000.00. SUFCU, held a second position deed of trust lien in the Property, in the approximate sum of \$25,000.00. On September 29, 1992, Olympus Bank mailed its Notice of Trustee's Sale to all interested parties having any interest of record in the Property. SUFCU received four separate envelopes, each containing an identical copy of the Notice of Trustee's Sale. Two envelopes were addressed to "Southern Utah Federal Credit Union" and two were addressed to "St. George Federal Credit Union nka Southern Utah Federal Credit Union." Two of the four notices were sent via regular mail and two were sent via certified mail, return receipt requested. The two certified mailings were received by a "Pat Stratton" who signed both post

office return receipts on October 5, 1992. Neither of the two notices which were sent via regular mail were ever returned to Olympus Bank as undeliverable.

In addition to the mailing of Notices of Trustee's Sale to all interested parties, Olympus Bank caused the notice to be posted on the subject property and in three public places in Washington County, Utah on September 27, 1992. Furthermore, Olympus Bank caused the notice to be published in The Daily Spectrum on Tuesday, September 22, 1992; Tuesday, September 29, 1992; and on Tuesday, October 6, 1992. The Notice of Trustee's Sale recited that the sale would be held at the Washington County Courthouse, at or about 197 East Tabernacle in St. George, Utah. The building located at 197 East Tabernacle in St. George is the "Washington County Administration Building." This building does not house any of the courts.

In times past, the Washington County Administration building housed the Fifth Judicial District Court and was called the "Washington County Courthouse." Although the building located at 197 East Tabernacle no longer houses any courts, it is still referred to as the "Courthouse" or the "Old Courthouse" by many residents of St. George, Utah. Some foreclosure sales are still conducted at 197 East Tabernacle and title insurance companies insure such sales. The Fifth Judicial District Court is now

located at 220 North 200 East in St. George, Utah, in a building named the "Hall of Justice."

Representatives of SUFCU had contacted Olympus Bank in the days prior to the trustee's sale to discuss the fact that SUFCU would appear at, and bid at the trustee's sale for the purpose of protecting it's second lien position in the Property. Stevens and SUFCU had discussed the trustee's sale over the phone approximately two weeks prior to the sale.

On October 20, 1992, Bob Elliott, as the representative of Olympus Bank, Stevens, and several other individuals went to 197 East Tabernacle, St. George, Utah, to witness or participate in the 10:00 a.m. foreclosure sale. The representative of SUFCU and its counsel went to the Hall of Justice at 220 North 200 East, St. George, Utah, to participate in the foreclosure sale. Bob Elliott conducted the foreclosure sale at 197 East Tabernacle and received bids from Olympus Bank, Stevens and one other individual. The highest bid was received from Stevens and Bob Elliott sold the property to him.

Shortly after the foreclosure sale was conducted, SUFCU contacted Bob Elliott to inquire as to why the sale had not been conducted. Mr. Elliott informed SUFCU that the sale had been conducted at 197 East Tabernacle.

SUFCU filed the subject action for declaratory judgment pursuant to Rule 57 of the Utah Rules of Civil Procedure and Utah Code Annotated § 78-33-1 et seq. (1953, as amended), asking the Court to determine whether the subject foreclosure sale was valid under Utah Code Annotated § 57-1-25(2) (1953, as amended) because it was conducted at 197 East Tabernacle in St. George, Utah rather than at the Hall of Justice at 220 North 200 East in St. George, Utah. SUFCU petitioned the Court for a Temporary Restraining Order to prevent Olympus Bank from conveying title to the Property to Stevens while the Court determined whether the sale was valid. Olympus Bank and Stevens did not oppose SUFCU's petition and the Court granted a Temporary Restraining Order on November 12, 1992 and continued the Order on November 12, 1992 pending a Summary Judgment or other dispositional hearing.

From the undisputed facts described above, the Court concludes that there are no material issues of fact in dispute and this matter is proper before the Court for adjudication pursuant to Rule 56 of the Utah Rules of Civil Procedure. The Court further concludes that although the building located at 197 East Tabernacle, St. George, Utah is generally known or referred to as a "courthouse" by the general public, it does not currently house any courts. Nevertheless, the Utah Court of Appeals has held that "The objective of the notice requirements is to protect the rights

of those with an interest in the property to be sold. The sufficiency of the notice or the validity of a subsequent sale will not be affected by immaterial errors and mistakes if those objections are met." Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217, 220 (Utah App. 1990).

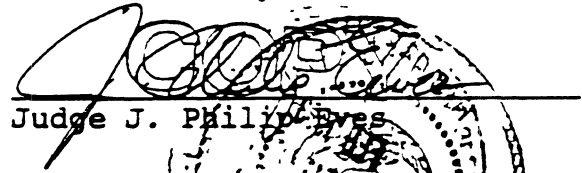
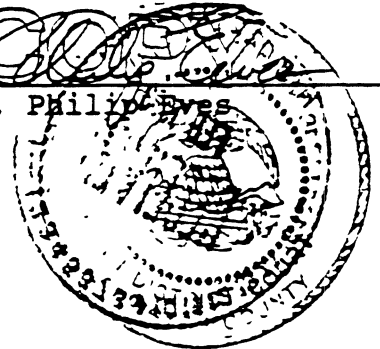
Notwithstanding the fact that Olympus Bank's foreclosure sale was conducted at a location that does not house a court, the foreclosure sale is valid because the Notice of Trustee's Sale adequately described the location of the sale to all parties with an interest in the Property. Consequently, the rights of all parties with an interest in the Property were protected and the purpose of the notice requirement was met. There is no evidence that the interests of the debtors were sacrificed in the sale, and any injury to SUFCU resulted from its own error. Because the foreclosure sale is valid, the Temporary Restraining Order which prohibits the transfer of title from Olympus Bank to Stevens should be terminated. Based on the foregoing,

IT IS HEREBY ORDERED that Olympus Bank's Motion for Summary Judgment be and the same is hereby granted. The foreclosure sale conducted by Olympus Bank on October 20, 1992 at 197 East Tabernacle, in St. George, Utah is valid and enforceable in every respect and the Temporary Restraining Order prohibiting Olympus Bank from conveying title to the subject real property to

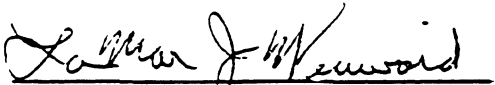
Stevens which was entered by the Court on November 12, 1992 and continued on November 19, 1992 is hereby terminated.

IT IS FURTHER ORDERED that Southern Utah Federal Credit Union's Motion for Summary Judgment is hereby denied and the action filed by Southern Utah Federal Credit Union is hereby dismissed with prejudice with respect to all parties.

DATED this 24th day of February, 1993.


Judge J. Philip Eves


Approved as to form:


Lamar J. Winward
Attorney for Southern Utah
Federal Credit Union


G. Rand Beacham
Attorney for Joseph E. Stevens